

Securities and Exchange Commission

§ 240.3b-17

(b) The Commission may issue an order pursuant to § 240.15a-1(b)(4) clarifying whether certain securities activities are within the scope of ancillary portfolio management securities activities.

[63 FR 59395, Nov. 3, 1998]

§ 240.3b-16 Definitions of terms used in Section 3(a)(1) of the Act.

(a) An organization, association, or group of persons shall be considered to constitute, maintain, or provide “a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange,” as those terms are used in section 3(a)(1) of the Act, (15 U.S.C. 78c(a)(1)), if such organization, association, or group of persons:

(1) Brings together the orders for securities of multiple buyers and sellers; and

(2) Uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.

(b) An organization, association, or group of persons shall not be considered to constitute, maintain, or provide “a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange,” solely because such organization, association, or group of persons engages in one or more of the following activities:

(1) Routes orders to a national securities exchange, a market operated by a national securities association, or a broker-dealer for execution; or

(2) Allows persons to enter orders for execution against the bids and offers of a single dealer; and

(i) As an incidental part of these activities, matches orders that are not displayed to any person other than the dealer and its employees; or

(ii) In the course of acting as a market maker registered with a self-regulatory organization, displays the limit

orders of such market maker's, or other broker-dealer's, customers; and

(A) Matches customer orders with such displayed limit orders; and

(B) As an incidental part of its market making activities, crosses or matches orders that are not displayed to any person other than the market maker and its employees.

(c) For purposes of this section the term *order* means any firm indication of a willingness to buy or sell a security, as either principal or agent, including any bid or offer quotation, market order, limit order, or other priced order.

(d) For the purposes of this section, the terms *bid* and *offer* shall have the same meaning as under § 240.11Ac1-1.

(e) The Commission may conditionally or unconditionally exempt any organization, association, or group of persons from the definition in paragraph (a) of this section.

[63 FR 70918, Dec. 22, 1998]

§ 240.3b-17 Definitions of terms used in Section 3(a)(4) of the Act.

For purposes of Section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)):

(a) The term *chiefly compensated* means that the “relationship compensation” received by a bank from a trust or fiduciary account exceeds the “sales compensation” received by the bank from such account during the immediately preceding year, which is either a calendar year or other fiscal year consistently used by the bank for recordkeeping and reporting purposes.

(b) The term *flat or capped per order processing fee equal to not more than the cost incurred by the bank in connection with executing securities transactions for trustee and fiduciary customers* means a fee that is no more than the amount a broker-dealer charged the bank for executing the transaction, plus the costs of any resources of the bank that are exclusively dedicated to transaction execution, comparison, and settlement for trust and fiduciary customers.

(c) The term *indenture trustee* means any trustee for an indenture to which the definition given in Section 303 of the Trust Indenture Act of 1939 (15 U.S.C. 77ccc) applies, and any trustee

for an indenture to which the definition in Section 303 of the Trust Indenture Act of 1939 (15 U.S.C. 77ccc) would apply but for an exemption from qualification pursuant to Section 304 of the Trust Indenture Act of 1939 (15 U.S.C. 77ddd).

(d) The term *investment adviser* if the bank receives a fee for its investment advice means a bank that has a relationship with the customer paying the fee in which the bank:

(1) Provides, in return for the fee, continuous and regular investment advice to the customer's account that is based upon the individual needs of the customer; and

(2) Under state law, federal law, contract, or customer agreement owes a duty of loyalty, including an affirmative duty to make full and fair disclosure to the customer of all material facts relating to conflicts.

(e) The term *money market fund* means an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) that is regulated as a money market fund pursuant to § 270.2a-7 of this chapter.

(f)(1) The term *no-load* in the context of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) means:

(i) Purchases of the investment company's securities are not subject to a sales load, as that term is defined in Section 2(a)(35) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(35)), or a deferred sales load, as that term is defined in § 270.6c-10 of this chapter; and

(ii) The investment company's total charges against net assets for sales or sales promotion expenses and personal service or the maintenance of shareholder accounts do not exceed 0.25 of 1% of average net assets annually and are disclosed in the money market fund's prospectus.

(2) For purposes of paragraph (f)(1) of this section, charges for the following will not be considered charges for personal service or for the maintenance of shareholder accounts:

(i) Transfer agent and subtransfer agent services for beneficial owners of the investment company shares;

(ii) Aggregating and processing purchase and redemption orders;

(iii) Providing beneficial owners with statements showing their positions in the investment companies;

(iv) Processing dividend payments;

(v) Providing subaccounting services for investment company shares held beneficially;

(vi) Forwarding shareholder communications, such as proxies, shareholder reports, dividend and tax notices, and updating prospectuses to beneficial owners; or (vii) Receiving, tabulating, and transmitting proxies executed by beneficial owners.

(g)(1) The term *nominal one-time cash fee of a fixed dollar amount* means a payment in either of the following forms that meets the requirements of subparagraph (2):

(i) A payment that does not exceed one hour of the gross cash wages of the unregistered bank employee making a referral; or

(ii) Points in a system or program that covers a range of bank products and non-securities related services where the points count toward a bonus that is cash or non-cash if the points (and their value) awarded for referrals involving securities are not greater than the points (and their value) awarded for activities not involving securities.

(2) Regardless of the form of payment, the payment may not be related to:

(i) The size, value, or completion of any securities transaction;

(ii) The amount of securities-related assets gathered;

(iii) The size or value of any customer's bank or securities account; or

(iv) The customer's financial status.

(h) The term *referral* means a bank employee arranging a first securities-related contact between a registered broker-dealer and a bank customer, but does not include any activity (including any part of the account opening process) related to effecting transactions in securities beyond arranging that first contact.

(i) The term *relationship compensation* means any compensation received by a bank in connection with activities for which the bank relies on an exception under Section 3(a)(4)(B)(ii) of the Act

(15 U.S.C. 78c(a)(4)(B)(ii)) that is received directly from a customer or beneficiary, or directly from the assets of the trust or fiduciary account, and consists solely of an administration or annual fee (payable on a monthly, quarterly, or other basis), a percentage of assets under management fee, or a flat or capped per order processing fee equal to not more than the cost incurred by the bank in connection with executing securities transactions for trust and fiduciary accounts, or any combination of such fees.

(j) The term *sales compensation* means any compensation received by a bank in connection with activities for which the bank relies on an exception under Section 3(a)(4)(B)(ii) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)) that:

(1) Is a fee for effecting a transaction in securities that is not a flat or capped per order processing fee equal to not more than the cost incurred by the bank in connection with executing securities transactions for trustee and fiduciary customers;

(2) Is compensation that if paid to a broker or dealer would be payment for order flow, as defined in § 240.10b-10;

(3) Is a finders' fee received in connection with a securities transaction or account, except a fee received pursuant to Section 3(a)(4)(B)(i) of the Act (15 U.S.C. 78c(a)(4)(B)(i));

(4) Is a fee paid for an offering of securities that is not received directly from a customer or beneficiary, or directly from the assets of the trust or fiduciary account;

(5) Is a fee paid pursuant to a Rule 12b-1 plan under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*); or

(6) Is a fee paid by an investment company for personal service or the maintenance of shareholder accounts, except a fee that is not part of a Rule 12b-1 plan under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) for:

(i) Transfer agent and subtransfer agent services for beneficial owners of shares in the investment company;

(ii) Aggregating and processing purchase and redemption orders;

(iii) Providing beneficial owners with statements showing their positions in the investment companies;

(iv) Processing dividend payments;

(v) Providing subaccounting services for shares in the investment company held beneficially;

(vi) Forwarding shareholder communications, such as proxies, shareholder reports, dividend and tax notices, and updating prospectuses to beneficial owners; or

(vii) Receiving, tabulating, and transmitting proxies executed by beneficial owners.

(k) The term *trustee capacity* in Section 3(a)(4)(B)(ii) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)) includes an indenture trustee or a trustee for a tax-deferred account described in Sections 401(a), 408, and 408A under subchapter D and in Section 457 under subchapter E of the Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*).

[66 FR 27798, May 18, 2001]

§ 240.3b-18 Definitions of terms used in Section 3(a)(5) of the Act.

For purposes of Section 3(a)(5)(C) of the Act (15 U.S.C. 78c(a)(5)(C)):

(a) The term *affiliate* means any company that controls, is controlled by, or is under common control with another company.

(b) The term *consumer-related receivable* means any obligation incurred by any natural person to pay money arising out of a transaction in which the money, property, insurance, or services (being purchased) are primarily for personal, family, or household purposes.

(c) The term *member of a syndicate of banks* means a bank that is a participant in a syndicate of banks and contributes no less than 10% of the money loaned by the syndicate.

(d) The term *obligation* means any note, draft, acceptance, loan, lease, receivable, or other evidence of indebtedness that is not a security issued by a person other than the bank.

(e) The term *originated* means initially making and funding an obligation.

(f) The term *pool* means more than one obligation or type of obligation grouped together to provide collateral for a securities offering.

(g) The term *predominantly originated* means that the bank or its affiliates, not including any broker or dealer affiliates, originated no less than 85% of